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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1130. [redacted]

FRANK PHELAN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1967.

No. 1130, Miscellaneous.

FRANK PHELAN,

Petitioner,

VS.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania affirming judgments of sentence (Appendix A of Petition), concurring opinion, Bell, C. J. (Appendix B of Petition), and dissenting opinion, Roberts, J. (Appendix C of Petition) are reported at 427 Pa. 265, 234 A. 2d 540 (1967). The order refusing reargument is reported at 427 Pa. 265, 267, 234 A. 2d 540.

JURISDICTION.

Petitioner asserts that jurisdiction of this Court is invoked under 28 U. S. C. §1257(3). Respondent contends that this case presents no questions involving any right, privilege or immunity set up under the Constitution of the United States.

QUESTIONS PRESENTED.

1. Were petitioner's federal constitutional rights violated by refusal of State Court to permit him to withdraw pleas of guilty, where the pleas were entered at an arraignment when petitioner was represented by experienced and distinguished counsel retained by petitioner's family and the record conclusively establishes that the pleas were entered freely and voluntarily and with full knowledge of the nature of the charges against him and of the possible consequences of the pleas of guilty?

2. Were petitioner's federal constitutional rights violated

by denial of a motion made by court appointed counsel, who superseded privately retained counsel, to employ a special investigator, at the county's expense, where the sole purpose of employment was to investigate rumors as to improper police practices, including the administering of drugs, where there was no assertion that petitioner's pleas of guilty were coerced, unlawfully induced, or in any sense involuntarily entered, and where counsel were given full access to all records of all drugs and medications administered throughout petitioner's confinement?

3. Were petitioner's federal constitutional rights violated by denial of motions made by court appointed counsel, who superseded privately retained counsel, to employ additional psychiatric experts to examine their client, where such motions were made immediately prior to, and on, the day fixed for the hearing to determine the degree of guilt, where counsel were in possession of extensive reports of psychiatrists employed at the request of petitioner's prior counsel, where reports of other psychiatrists and physicians were made available to counsel and where no need for further psychiatric examinations was established?

4. Were petitioner's federal constitutional rights violated by refusal of the court, during the hearing to determine the degree of guilt, to admit medical testimony tending to show that at the time of the commission of the crimes petitioner was "psychotic" and lacked the mental ability to form the intent to kill, where the medical testimony was sufficient to support the finding that petitioner could distinguish between right and wrong and there was no evidence to indicate that he lacked the understanding to know the nature or quality of his acts, and where the excluded testimony was received by the court and fully considered in mitigation of the penalty during the hearing to determine the sentences to be imposed?

5. Were petitioner's federal constitutional rights violated by State law which applies the M'Naghten rules as the test of legal insanity in preference to other tests suggested or applied in other jurisdictions?

STATEMENT.

Petitioner, Frank Phelan, plead guilty generally to two indictments charging him with the murders of Judith Lopinson and Joseph Malito. Thereafter, after a hearing before a three-judge court, he was unanimously found guilty of murder in the first degree and sentenced to death in each case. He appealed from the judgments to the Supreme Court of Pennsylvania. The judgments were affirmed, September 26, 1967, opinion at 427 Pa. 265, 234 A. 2d 540, one Justice dissenting. A petition for re-argument was refused, November 24, 1967, 427 Pa. at 267, 234 A. 2d at 540.

The facts relevant to this petition are: Early in the morning of June 19, 1964 Judith Lopinson and Joseph Malito were shot to death in the basement office of a restaurant in the City of Philadelphia. The restaurant was operated as a partnership by Malito and Jack Lopinson (husband of Judith). On July 15, after an inquest conducted by the Medical Examiner of the City of Philadelphia,[1] Jack Lopinson was charged with the murders and held for action by the grand jury. Later a warrant charging Phelan with the murders issued and on July 26, 1964, after a hearing before a magistrate, he was committed to prison pending action by the grand jury.

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[1] In Philadelphia, the Medical Examiner has replaced the former Office of Coroner and possesses all the powers of a Coroner, **The Philadelphia Code of Ordinances** §2-102 (enacted under authority of the Philadelphia Home Rule Charter, adopted April 17, 1951). These powers include those "relative to the investigation of sudden violent and suspicious deaths and the determination of whether the person or persons responsible shall be charged with crime."

On the very next evening, July 27, Phelan summoned the senior officer of the prison and told him he wanted "to confess who committed the murders." The homicide division of the Philadelphia Police was notified and in the following morning Phelan gave to the police a detailed, recorded, factual description of the killings and the circumstances which instigated them. He admitted designedly shooting the victims at the instigation of Lopinson. The taking of this statement was interrupted temporarily to enable Phelan to appear in court and testify, under oath, in a habeas corpus proceeding instituted by Lopinson. His testimony at this hearing was identical with his statements to the police. At this hearing, and before Phelan testified, Phelan was fully advised by the Court of his right to have counsel present to consult with and to advise him, but Phelan insisted that he did not need counsel nor wanted counsel, despite the fact that his family had retained counsel for him who was present in the courtroom.

On August 12, John Patrick Walsh, Esquire, who had been retained by Phelan's family, entered his appearance on behalf of Phelan. Mr. Walsh is an experienced criminal trial lawyer, bearing an impeccable reputation, and long recognized by the bench and bar as one of Philadelphia's best advocates in this area of the law.

On October 26, Phelan appeared in court with Mr. Walsh, was arraigned and plead guilty generally to the two indictments charging him with the aforementioned murders. Before the pleas were accepted, Phelan was questioned extensively in open court by the court and by the assistant district attorney. The transcript of the preliminary questioning appears in the opinion filed by the Supreme Court of Pennsylvania, 427 Pa. at 269, 270, 234 A. 2d at 543, 544 (Petitioner's Appendix A, pp. 31, 32, 33). The arraignment and pleas of guilty followed. By agreement the hearing for determination of the degree of guilt was postponed indefinitely.

On January 29, February 1 and 2, 1965, Phelan testified, under oath, as a Commonwealth witness in the trial of Jack

Lopinson. His extensive testimony was similar to his previous statement to the police and to his testimony at Lopinson's habeas corpus hearing.[2]

On July 19, 1965, Phelan filed a self-prepared petition requesting that his counsel, Mr. Walsh, be dismissed and that other counsel be appointed for him, Mr. Walsh filed a contemporaneous petition asking leave to withdraw as counsel for the reason that he and his client had become estranged. After hearing, the court permitted Mr. Walsh to withdraw as counsel and, shortly thereafter, entered an order appointing his present counsel to represent Phelan.

Following their appointment, Phelan's counsel sought on two occasions to withdraw his guilty pleas and enter not guilty pleas on his behalf. The requests were denied. The first such motion was filed on October 8, 1965, nearly one year after the pleas had been entered and accepted by the court, and three days before the time previously fixed for hearing for determination of the degree of guilt (October 11, 1965).

In these motions Phelan asserted he should be permitted to withdraw the pleas of guilt because, (1) he had not been "arraigned" on the indictments in open court; (2) at the time the guilty pleas were entered his mental and physical condition were such that he was unable to comprehend the nature and effect of the proceedings; and (3) of the existence of "after discovered evidence." A hearing was held on these motions on October 11, 1965 (the day previously set for the hearing on the determination of degree of guilt). Opportunity was afforded Phelan and his counsel to present any evidence in support of his allegations. No evidence was submitted. The motions to withdraw the pleas of guilty were denied.

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[2] Lopinson was found guilty, by a jury, of murders in the first degree. The jury, thereafter, fixed the penalty of death. Lopinson appealed from his convictions and sentences to the Supreme Court of Pennsylvania which affirmed the judgments. **Commonwealth v. Lopinson**, 427 Pa. 284, 234 A. 2d 552 (1967).

Also, following their appointment, Phelan's present counsel presented motions to the trial court for leave to hire a special investigator and psychiatric experts to examine their client.[3] These motions were also denied. The purposes for which these hirings were sought and the reasons why the court denied the motions will be discussed in our Argument.

The hearing for determination of the degree of guilt then ensued. As previously noted, this hearing was before a three-judge court which unanimously found Phelan guilty of murder in the first degree in both murders. After an extensive hearing on the question of punishment, the court fixed the penalties at death. At these hearings extensive testimony was given based on prior psychiatric examinations of Phelan. During the hearing to determine the degree of guilt, the court refused to admit medical testimony tending to show that at the time of the killings Phelan lacked the mental ability to form the specific intent to kill and that he lacked substantial capacity to conform his conduct to the requirements of the law. Since the denial of this proffered testimony is one of the reasons urged by Phelan for the granting of certiorari, this subject will be argued in our brief.

To conclude our Statement we deem it essential to briefly summarize the facts surrounding the murders, facts which were first disclosed by Phelan himself and testified to by him in open court on several occasions when he appeared as a Commonwealth witness at the hearing and trial of Jack Lopinson. This summary is taken verbatim from the opinion of the Supreme Court of Pennsylvania when it

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[3] Since the appointment of Phelan's present counsel was predicated upon a finding that Phelan was indigent, the trial court had the power to authorize, at the expense of Philadelphia County, the utilization of the services of experts to assist in the preparation and proper defense of his cause (Act of March 22, 1907, P. L. 31, as amended, 19 PURD. PA. STAT. ANN. §784).

affirmed the convictions of Lopinson. 427 Pa. at 289-290, 234 A. 2d at 557:[4]

> "Lopinson requested Phelan to kill both his wife and Malito, to which Phelan agreed; Lopinson drove Phelan in his automobile to Delaware to secure the murder guns for which Lopinson paid the purchase price; the time and place for the commission of the killings were suggested by Lopinson; originally the crimes were planned for two nights prior but at the last minute were deferred; a few hours before the killings, Phelan and Lopinson discussed and finalized the plans in the former's automobile; at Lopinson's suggestion Phelan entered the basement of the restaurant through a rear cellar door and secreted himself, while waiting for Judith Lopinson and Malito to come from the first floor of the restaurant after it closed to the basement office to count the day's receipts; upon their arrival Phelan entered the office with a gun in each hand and summarily shot each victim in the head twice; after Phelan went upstairs and reported the shootings to Lopinson, together they returned to the office and upon discovering that death had not yet taken its toll Phelan, at the request of and in the presence of Lopinson, fired additional bullets into the heads of the victims. The two then returned upstairs and discussed the explanation previously agreed upon that Lopinson would give the police, namely, that the restaurant had been held up by two unknown men who had fatally shot Judith Lopinson and Malito, and also shot Lopinson. To fortify this story, Phelan, with consent, then shot Lopinson through the fatty tissue of his thigh, and after Phelan left the premises Lopinson fired a bullet from his own gun into a wall of the restaurant. When the police arrived, Lopinson told them the concocted story about

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[4] Many of the details of these facts were corroborated by numerous other witnesses who testified at Lopinson's trial.

the restaurant being robbed. (At trial Lopinson admitted he gave this story to the police and that it was a lie.)"[5]

From the evidence at Lopinson's trial "the jury could also find that Lopinson wanted to get rid of his wife for another woman, his mistress; and killing Malito would help solve his financial troubles and render the false robbery story by two unknown intruders more plausible" (427 Pa. at 290, 234 A. 2d at 557).

After Phelan volunteered "to confess who committed the murders" he took the police to a place adjacent to the Delaware River in Philadelphia where, he stated, he threw into the river the two guns he used in the killings. These guns were subsequently recovered by the police and were identified as two of the guns purchased in the State of Delaware by Lopinson, accompanied by Phelan.

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[5] The killings occurred early in the morning after the restaurant closed and all patrons had departed.

ARGUMENT.

I. The refusal of the State Courts to permit the withdrawal of pleas of guilty did not violate Phelan's constitutional rights where the record conclusively established that the pleas were entered after a formal arraignment at which he was represented by able and experienced counsel retained by his family, where an extensive inquiry by the court, prior to the arraignment and pleas, established that Phelan fully understood the nature of the charges, the possible punishment after conviction, and understood that he was admitting his guilt in open court, and where the first formal motion to withdraw the guilty pleas was not made until nearly a year after the pleas were entered.

The pleas of guilty were entered on October 26, 1964, three months after Phelan had been formally charged with the murders, had spontaneously and voluntarily given a statement to the police wherein he fully detailed every fact and circumstance of the killings including Lopinson's participation therein, and had appeared as a witness in a habeas corpus proceeding instituted by Lopinson where Phelan testified at length repeating all he had informed the police. Three months after he pleaded guilty, Phelan again appeared in open court as a Commonwealth witness and testified in Lopinson's trial. For the third time he repeated the statement and testimony previously given. In July of 1965, Phelan sought to dismiss his counsel and to have other counsel appointed for him. His counsel joined in this application on the ground that he and his client had become estranged. Mr. Walsh was permitted to withdraw and Phelan's present counsel were appointed to represent him.

The first formal motion to withdraw the pleas of guilty was filed nearly one year after the pleas had been entered

and only three days before October 11, 1965, the time previously fixed for the hearing to determine the degree of guilt. The motion was renewed on October 11.[6]

The grounds upon which the motion to withdraw the pleas were based were, (1) Phelan had not been "arraigned" in open court; (2) at the time he entered the guilty pleas his mental and physical condition were such that he was unable to comprehend the nature and effect of the proceedings, and (3) the existence of "after discovered evidence." At the hearing on the motion every opportunity was afforded Phelan to present evidence in support of his allegations. *No evidence was submitted.*

A. The arraignment.

Two and one-half months after Phelan's family had retained John Patrick Walsh, Esquire, the pleas were entered in open court. Mr. Walsh is a lawyer of vast criminal trial experience and bears an excellent reputation among the Bench and Bar. Before the arraignment and entry of the pleas, the Court conducted a thorough inquiry into Phelan's comprehension of the nature of the charges against him and of the consequences thereof. He was given the opportunity of informing the court of his plea, and did so. The extent of the inquiry and Phelan's responses appear in the opinion of the Supreme Court of Pennsylvania. Because of its length we will not set it forth herein; it will be found in Phelan's present petition, Appendix A, pp. 31 to 33 inclusive. In the Court record, after this inquiry, the following appears:

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[6] It should be noted that in July of 1965, during the hearing on Phelan's request for new counsel, he did state: "If the lawyer that put that guilty plea in has withdrawn, that should also be withdrawn . . . I'm not claiming my plea was one by me." It would appear that Phelan had a change of mind regarding his plea in July of 1965. However, although his new counsel were appointed August 2, no motions were made respecting the pleas until October.

> "Defendant, arraigned at bar of the court, pleads guilty to Bill No. 468, Murder, and to Bill No. 469, Murder."

It is now complained that the record does not show that Phelan was "actually arraigned." In Pennsylvania, by Rule promulgated by its Supreme Court it is provided:

> "Arraignment in capital cases shall be conducted in open court and shall consist of a reading of the indictment to the defendant and calling upon him to plead thereto."[7]

The Rule is declaratory of what has always been the law in Pennsylvania, and it has long been the practice, in capital cases, to formally read the indictment to the defendant before taking his plea. What Phelan here complains of is that the record, as above quoted, does not affirmatively show that "the bills of indictment charging petitioner with murder were read to him in open court."

This issue was raised in the State courts. It was noted in the record that the trial judge distinctly recalled that the indictments were read to Phelan at the pertinent time. It was also the recollection of the assistant district attorney (Petition for Writ of Certiorari, pp. 12, 13). Apart from the factual confirmance that the indictments were read to Phelan, it is also clear that the record is sufficient to establish full compliance with the requirement.

This very issue was raised in *Johnson v. United States*, 225 U. S. 405 (1911), where the record, after reciting the presence of the attorneys and defendant added that "thereupon the defendant, pleads thereto not guilty, and for trial puts himself upon the country, and the attorney of the United States doth the like." It was contended that the arraignment was not proper because "record does not show that the indictment was read to the defendant"; that the

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[7] PA. R. CRIM. PROC. Rule 317(a) (19 PURD. PA. STAT. ANN.) Appendix.

reading was necessary in order to comply with the Sixth Amendment, which, among other things, provides that "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusations . . ." Your Honorable Court, after noting that "there is no explicit provision in the laws of the United States describing what shall constitute an arraignment," then stated, ". . . the word 'arraignment' is used as comprehensively descriptive of what shall precede the plea. If it is so used in the law, it certainly can be used in the record as showing the performance of that which the law prescribes by it" (225 U. S. at 411).

Accordingly it was held: "We may presume that the law was complied with in the present case and that Johnson was given a copy of the indictment as well as having had it read him, which we think the record sufficiently shows . . ." (225 U. S. at 411).

We know of no subsequent case deviating from this statement. And, as we have noted, we have affirmative evidence in this case, in addition to the presumption from the record, that the indictment was in fact read to Phelan. Furthermore, this record shows that, prior to the arraignment, Phelan was explicitly informed, not only of the nature and cause of the accusation, but also of the serious consequences of a plea of guilty. It is even questionable whether due process requires the reading of the indictment to a defendant if he be otherwise informed of the nature and cause of the accusations, and in this case, it is clear, that the Sixth Amendment requirement, in this regard, was fully complied with as to Phelan, as is established by the prearraignment inquiry.

> "Due process of law . . . does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." *Garland v. Washington,* 232 U. S. 642, 645 (1913).

B. The allegation that Phelan was unable to comprehend the nature and effect of the proceedings, and the allegation of the existence of "after discovered evidence."

As we have indicated, every opportunity was afforded Phelan to present any available evidence he desired in support of the above-captioned allegations in the State court. Not an iota of evidence was submitted. We suggest that an unsupported allegation presents no justiciable issue.

C. The right to withdraw the guilty pleas.

> "A criminal defendant . . . has no absolute right to withdraw a plea of guilty. United States v. Panebianco, 208 F. 2d 238 (2d Cir. 1953), Cert. denied 347 U. S. 913. He has the burden of establishing grounds for the withdrawal. United States v. Smiley, 322 F. 2d 248 (2d Cir. 1963), and the determination of whether the burden has been met rests within the discretion of the trial judge, whose decision is reversible only if clearly erroneous. United States v. Hughes, 325 F. 2d 789 (2d Cir. 1964)." *United States v. Giuliano,* 348 F. 2d 217 (2d Cir.), Cert. denied, 382 U. S. 939 (1965).

This is also Pennsylvania law. *Commonwealth v. Scoleri,* 415 Pa. 218, 247, 202 A. 2d 521 (1964). The Supreme Court of Pennsylvania in applying here the standards set forth in *Scoleri,* as to the withdrawal of a guilty plea, determined that the record in Phelan's trial contained "nothing that would place the case in any of the categories delineated in *Scoleri* . . ." 427 Pa. at 275, 234 A. 2d at 546.

This record is conclusive that Phelan, while represented by able and experienced counsel, entered his pleas "voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. United States,* 274 U. S. 220, 223-24 (1926).

Additionally, he made "candid admission of all essential elements of the crime in open court." See, *Everett v. United States*, 336 F. 2d 979, 984 (D. C. Cir. 1964). To permit a withdrawal under the circumstances of this case would "encourage accused persons to 'play games' with the courts . . ." *Ibid.*

II. Phelan's constitutional rights were not violated by denial of a motion by his present counsel to hire a special investigator at county expense under the circumstances of this case.

Following their appointment, Phelan's present counsel requested leave of court to employ a special investigator. The motion was denied. His present counsel were appointed for him by the court and, since Phelan was indigent, the trial court was empowered under a Pennsylvania Statute to authorize at county expense, the utilization of the services of experts to assist in the preparation and presentation of his cause.[8] This statute is the same statute which authorizes the appointment of counsel for indigent persons charged with murder. The right to have the services of an investigator may be necessary, in an appropriate case, to implement the right to the effective assistance of counsel. We do not gainsay this right where it is appropriate, and the Supreme Court of Pennsylvania fully recognized the right (427 Pa. at 275, 234 A. 2d at 547). However, in Phelan's case the request for services of an investigator was based solely on the ground that counsel wished to investigate *rumors* that Phelan's admissions of guilt, his testimony at the hearing and trial of Lopinson's case, and his own pleas of guilty were the result of improper police practices following his arrest, including the administering of drugs.

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[8] Act of March 22, 1907, P. L. 31, as amended, 19 PURD. PA. STAT. ANN. §784.

Moreover, it is essential to note that a no time did Phelan ever assert that his pleas of guilty were coerced, unlawfully induced, or in any sense involuntarily entered. More importantly, during Phelan's extensive testimony in the Lopinson trial, he was vigorously cross-examined as to his treatment by the police during his confinement and as to his use of drugs. He categorically denied that his admissions of guilt or testimony against Lopinson were induced by any conduct of the police or by the use of drugs. And also, at the hearing on his motions to withdraw his pleas, Phelan did not testify nor did he indicate that his testimony in Lopinson's trial was not correct. Additionally, it is not disputed that Phelan's counsel were given full access to (1) the record of Lopinson's trial which included a detailed record of all drugs and medications administered to Phelan during the period of confinement up to the date of Lopinson's trial, (2) copies of all statements given by Phelan to the police, and (3) records of the prison where Phelan was confined, which included all reports of several medical examinations and the times and dates of all drugs and medication administered to him.

In the face of these record facts, and the fact that the services of an investigator were sought solely to investigate rumors concerning subjects on which there existed a vast amount of material to which Phelan's counsel had full access, it is obvious that the denial of the motion did not, to the slightest degree, diminish or curtail the effectiveness of counsel's assistance. The right to assistance of counsel, though fundamental, "is not unrestrained." *United States ex rel. Allen v. Rundle,* 233 F. Supp. 633, 635 (D. C. Pa. 1964), Cert. denied 382 U. S. 857 (1965).

III. Phelan's constitutional rights were not violated by denial of a motion to permit retention of additional psychiatrists which were presented a few days before, and on the day of, the hearing fixed for the determination of guilt.

This issue resembles the one immediately preceding. On October 11, 1965, two days before the court was scheduled to hold a hearing to determine the degree of guilt, counsel for Phelan requested permission to retain psychiatrists to examine Phelan. The sole purpose of this motion was to ascertain the competency of Phelan to understand his pleas of guilty entered as of October 26, 1964. The motion was denied. On October 13, 1965, counsel renewed the motion, but this time they stated its purpose was to inquire into Phelan's ability to stand "trial," *i.e.*, the hearing to determine degree of guilt. The motion was refused. However, the court (a panel of three judges) clearly indicated that if, after hearing testimony, it was deemed necessary that further psychiatric examinations be made, it would order such examinations. As to Phelan's ability to stand trial, it should be here observed that on October 11, when Phelan's formal motion to withdraw his guilty pleas was presented to the court, he signed the motion in open court and when questioned responded that he had read the motions and thoroughly understood the contents.

In approaching the question whether the denial of the request to retain additional psychiatrists deprived Phelan of his constitutional rights, it is necessary to point out that Phelan's original counsel, Mr. Walsh, during his representation of Phelan, had procured reports of psychiatric examinations of Phelan conducted by two eminent psychiatrists who made their examinations at the request of Mr. Walsh. The results of these examinations will be discussed in the concluding portions of this brief. It is sufficient here to note that the reports of the two psychiatrists were available to

present counsel and much use was made thereof.[9] There was nothing in the reports to indicate that Phelan was not competent to understand the nature of his pleas of guilty entered on October 26, 1964. Also available to present counsel were reports of other psychiatrists and other physicians who examined Phelan at the request of prison officials or prosecution authorities.

Again, as we urged in the previous section of this brief, there is nothing in this record to indicate that the refusal to have additional psychiatric tests in any way interfered with the effectiveness of counsel's representation. Whether the issue which Phelan sought to raise at the time of his hearing in October 1965 was the competency of Phelan at the time he pleaded guilty or his competency to stand trial a year later, there was ample expert evidence in this case upon which the court could and did make its determinations. There was no showing that there was any need for additional tests. In this respect the instant case differs greatly from *Pate v. Robinson*, 383 U. S. 375 (1966),[10] where this Honorable Court held that the failure of the state court to hold any hearing on the competency of a defendant in a criminal case constituted a deprivation of his right to fair trial where the evidence raised a "bona fide doubt" as to defendant's competence to stand trial, especially where, under Illinois state law, it is required that "where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing pursuant to Ill. Rev. Stat., c. 38, Sec. 104-2 (1963). *People v. Shrake*, 25

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[9] Extensive quotations from the reports of Drs. Leopold and Appel are contained in Phelan's present petition, pp. 16-17.

[10] The petition lists **Pate v. Robinson** in the table of citations but does not refer to it at the page indicated (p. 28). There we find the case of **United States ex rel. Robinson v. Pate**, 345 F. 2d 691, cited for another point. It is erroneously entitled **Pate v. Robinson.** This Court of Appeals case was the earlier disposition of matter as to which this Honorable Court granted certiorari in **Pate v. Robinson.**

Ill. 2d 141, 182 N. E. 2d 754 (1962)." As the Pennsylvania Supreme Court said, 427 Pa. at 278, 234 A. 2d at 548, after reviewing *Pate v. Robinson*, "More importantly, the evidence in this record warrants no such doubt." We strongly urge that the State Court's evaluation of the evidence in this case justified its conclusion.

IV. Phelan's constitutional rights were not violated when the trial court, during the hearing to determine the degree of guilt, refused to admit medical testimony which was irrelevant as to the M'Naghten Rule.

This issue involves the relevancy of proffered testimony. Pennsylvania adheres to the M'Naghten Rule. The psychiatrists originally retained in behalf of Phelan reported that Phelan was suffering from a chronic, progressive schizophrenia and a compulsion to kill. They were specific in their opinions that he could distinguish between right and wrong. There was nothing in their opinions to indicate that Phelan lacked the understanding to know the nature or quality of his acts. By the tests applied in Pennsylvania, Phelan was clearly accountable for his criminal acts. At the hearing to determine the degree of guilt, Phelan's counsel offered, by medical witnesses, testimony tending to establish that at the time of the commission of the crimes Phelan lacked the mental ability to form the specific intent to kill, and also lacked substantial capacity to conform his conduct to the requirements of the law. The offer to prove the latter would have the effect of asking the state court to adopt the so-called Currens Test. Since Phelan's present petition argues that retention by Pennsylvania of the M'Naghten Rule denies a defendant in a criminal case due process, we will reserve our argument on this subject and our discussion of the various tests, both adopted and suggested, to the following section of this brief. Here we concern ourselves with the relevancy of

medical testimony tending to establish that Phelan, at the time of the killings, lacked the mental ability to form the intent to kill, which is a necessary ingredient of first degree murder. The offer was refused by the court during the hearing to determine the degree of guilt. However, this testimony was received in evidence and considered during the hearing to determine the sentences to be imposed.

Prior to the determination of Phelan's appeal by the Supreme Court of Pennsylvania, that court had already considered and ruled upon the admissibility of opinion psychiatric testimony to prove lack of specific intent to kill where the psychiatrists did not testify that the defendant was insane under the M'Naghten Rule, *Commonwealth v. Ahearn*, 421 Pa. 311, 218 A. 2d 561 (1966). It was there held that since the specific intent which is a necessary ingredient of nonfelony murder "may be found from a defendant's words or conduct or from the attendant circumstances together with all reasonable inferences therefrom, *and may be inferred from the intentional use of a deadly weapon on a vital part of the body of another human being*" (emphasis in original) (421 Pa. at 318, 218 A. 2d at 565), unless psychiatric testimony is introduced for the purpose of showing insanity under the M'Naghten Rule, such testimony is not admissible "(1) to absolve or exculpate and acquit a defendant of crime, or (2) to prove a lack of specific intent to kill, and thereby prohibit a verdict of murder in the first degree" (*Ahearn*, 421 Pa. at 324, 218 A. 2d at 568).

It was also there held that such testimony is, however, "admissible only after guilt has been determined by a jury or Court and is relevant and admissible thereafter only for the limited purpose of aiding the jury or court in fixing the penalty." *Ibid.* This was precisely the ruling of the Supreme Court of Pennsylvania in Phelan's appeal to that court (427 Pa. at 279, 234 A. 2d at 548) and, as we have previously noted, the psychiatric testimony was admitted in evidence in the instant case for the limited purposes indicated.

Moreover, in Phelan's trial the psychiatrists retained for him expressly stated that Phelan was a person who "can be expected to kill at any time that he is under . . . sufficient emotional pressure . . ." How can it be argued that Phelan did not have a specific intent to kill because his intent to kill was uncontrollable? Surely the gruesome facts of this case establish deliberate, intentional and malicious killings absent any evidence to warrant a finding that Phelan was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." The Pennsylvania Courts properly applied the long established principles of the law pertaining to murder. In effect, Phelan is requesting this Honorable Court to direct state courts to change their laws of murder. This is obviously not a due process question.

V. Application by a state court of the M'Naghten Rules for the determination of criminal responsibility does not constitute a violation of due process.

Phelan here urges that the retention by Pennsylvania of the rules laid down in M'Naghten's case,[11] so violates his right to due process under the Fourteenth Amendment that the state law should be declared unconstitutional. Pennsylvania adopted the M'Naghten Rules shortly after they were announced. *Commonwealth v. Mosler*, 4 Pa. 264 (1846). They have become firmly established and imbedded in the body of the law of Pennsylvania ever since. There exists an unbroken line of decisions restating the Rules. In 1960, the Supreme Court of Pennsylvania was specifically requested to reconsider its position and to abolish the M'Naghten Rules in Pennsylvania. In an exhaustive opin-

[11] 10 Cl. and F. 200, 210 (H. L. 1843).

ion, wherein all tests then adopted in other jurisdictions or proposed for adoption were examined, discussed and evaluated; the Court rejected all other suggested tests and decided to retain the M'Naghten test. *Commonwealth v. Woodhouse,* 401 Pa. 242, 164 A. 2d 98 (1960).

There is no doubt that M'Naghten has been criticized by psychiatrists, law school professors, law review writers and judges for many years. The literature is voluminous. But the alternative tests have also been studied and found to be objectionable, vague and unsound. Proponents of suggested new standards are, by nature, harsh critics of other theories. In the present state of discussion, controversy, and uncertainty, how can Your Honorable Court be requested to rule that one of tests, which has been applied by numerous states and federal circuits be declared constitutionally invalid? Obviously, this could not be done without, at the same time, telling the state courts which test to apply in the future. Is the state of psychiatric knowledge and judicial sagacity so crystalized today that a pronouncement of a new specific test becomes imperative? Which is to be selected? As this Honorable Court is well aware there exist a number of alternative rules. Without attempting to enumerate all, it is sufficient to note that we have the so-called Durham Rule *(Durham v. United States,* 214 F. 2d 862, 875 (D. C. Cir. 1954)), the American Law Institute proposal *(American Law Institute, Model Penal Code, Proposed Official Draft,* Sec. 4.01 et seq.), the so-called Currens test *(United States v. Currens,* 290 F. 2d 751, 775 (3rd Cir. 1961)).

We also have in use in some jurisdictions the M'Naghten rule with variations, e.g., its extension by the "irresistible impulse" theory. See *Saver v. United States,* 241 F. 2d 640 (9th Cir. 1957). Your Honorable Court dealt with the test to be applied in federal prosecutions in *Davis v. United States,* 160 U. S. 469 (1895) and 165 U. S. 373 (1897).

As to the possible impact of the federal Constitution upon a state rule as to legal insanity, however, Your Honorable

Court expressly said in *Leland v. Oregon*, 343 U. S. 790, 800, 801 (1952) (where Oregon's statute adopted the "right and wrong" test of legal insanity in preference to the "irresistible impulse" test),

> "Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions. The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's Case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty'."

We suggest that since 1952, there has been even wider disagreement; other and additional tests have been suggested and roundly criticized. The considerations which led Your Honorable Court not to interfere with Oregon's test in 1952 are equally, if not more, compelling today. *Leland* has been applied to California's use of the M'Naghten Rules as recently as 1963 in *Jackson v. Dickson*, 325 F. 2d 573 (9th Cir. 1963). We urge that it be applied to Pennsylvania's tests as well.

CONCLUSION.

It is respectfully requested that the petition for a writ of certiorari to the Supreme Court of Pennsylvania be denied for the foregoing reasons.

Respectfully submitted,

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